

Family and Medical Leave

OBJECTIVE

It is the Commonwealth's objective to provide eligible employees with up to 12 weeks of unpaid family or medical leave because of the birth of a child or the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes him or her unable to do his or her job.

I. EMPLOYEES TO WHOM POLICY APPLIES

[REVISED 12/94]

This policy applies to positions covered under the Virginia Personnel Act to include full-time and part-time classified, and restricted employees. This policy also applies to eligible wage employees. (See section II of Policy 2.20, Types of Employment.)

II. DEFINITIONS

A. Eligible employees

1. Covered employees identified in section I above who have been employed by the State for: (1) at least 12 months; and (2) at least 1,250 hours during the 12 months before the start of the leave.
2. Wage employees who have been employed by their agency for: (1) at least 12 months; and (2) at least 1,250 hours during the 12 months before the start of the leave.

NOTE: The required 1,250 hours do not have to be worked during consecutive months. However, the 1,250 hours of work requirement applies to the 12 months immediately preceding the start of the leave.

B. Employment benefits

All benefits provided by the Commonwealth to salaried employees including group life insurance, health insurance, annual and sick leave, educational benefits, and retirement contributions.

C. Family and medical leave

A leave without pay (or use of an employee's accrued leave) for up to 12 workweeks during a calendar year for the reasons specified in this policy in conformance with the federal Family and Medical Leave Act (FMLA) of 1993.

D. Health care benefits

The health insurance program covering eligible employees.

E. Health care provider

Health care providers include the following:

1. doctors of medicine or osteopathy who are authorized to practice medicine or surgery (as appropriate) by the state in which the doctors practice;
2. any other person determined by the Secretary of the Department of Labor to be capable of providing health care services; and

Family and Medical Leave

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3. others capable of providing health care services to include only podiatrists, dentists, clinical psychologists, optometrists, chiropractors, nurse practitioners and nurse-midwives authorized to practice in the state and performing within the scope of their practice as defined under state law. This also includes Christian Scientist practitioners listed with the First Church of Christ, Scientist in Boston, although an employee or family member may be required to submit to a medical examination for a second or third opinion (not treatment) from a non-Christian Science practitioner.
- F. Key position**
[REVISED 12/94]
A position within the highest paid 10 percent of *all the* state's employees, *working within 75 miles of the employee's agency/facility.*
- G. Parent**
Biological parent or individual who stood in place of the parent of the employee and was charged with the duties and responsibilities of the parent.
- H. Son or daughter**
A biological, adopted or foster child, a stepchild, or legal ward, or a child of a person standing in place of the parent. The child must either be under age 18 or be age 18 or older and incapable of self-care because of a mental or a physical disability.
- I. Spouse**
Husband or wife as recognized under the laws of the Commonwealth for the purpose of marriage.
- J. Serious health condition/illness**
An illness, injury, impairment or physical or mental condition that involves: (1) inpatient care in a hospital, hospice, or residential medical care facility; or (2) continuing treatment by a health care provider.

III. WHEN FAMILY AND MEDICAL LEAVE ALLOWED

- A. Time frames for use of FMLA**
Eligible full-time employees may take up to 12 workweeks (60 workdays; 480 work hours) of family and medical leave (FMLA) in a calendar year. The time missed from work due to FMLA cannot exceed 12 weeks in a calendar year.
- B. FMLA for full-time employees**
Eligible full-time employees may take up to 12 workweeks (60 workdays; 480 work hours) of unpaid family and medical leave per calendar year for the following reasons:
1. the birth of a child (to be taken within 12 months of the child's birth);
 2. the placement of a child with the employee for adoption or foster care (to be taken within 12 months of date of placement);
 3. in order to care for a child, a dependent son or daughter over 18 years of age who is incapable of self-care because of a mental or physical

Family and Medical Leave

disability, a spouse, or a parent who has a serious health condition that involves:

- a. in-patient care in a hospital, hospice, or residential medical care facility; or
- b. continuing treatment by a health care provider.

[REVISED 12/94]

4. because of a serious personal health condition that renders the employee unable to perform the functions of his or her position. Agencies may request certification that the employee is unable to work at all or is unable to perform any of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act. *Also, an employee who goes on leave without pay - workers' compensation may have that time counted towards his or her 12 weeks of FMLA.*

C. FMLA for eligible part-time employees

Eligible part-time employees may take up to 12 weeks of family and medical leave in a calendar year for the reasons listed in III(B) above. Actual hours taken will be counted on a prorated basis corresponding to the percentage of hours they normally are scheduled to work during a calendar year.

EXAMPLE:

A part-time employee works 25 hours per week year-round. During any 12-week period, she works a total of 300 hours. Therefore, if intermittent leave is taken, she may take up to 300 hours of family and medical leave in a calendar year.

D. FMLA for eligible wage employees

Eligible wage employees may take up to 12 weeks of family and medical leave in a calendar year for the reasons listed in section III(B) above. Actual hours taken will be counted on a pro-rated basis corresponding to the percentage of hours they normally are scheduled to work during the 365-day period prior to the date family and medical leave is scheduled to begin.

IV. RESTRICTED USE OF FAMILY AND MEDICAL LEAVE

- A. Family and medical leave may not be used for short-term conditions for which treatment and recovery are brief, such as minor illnesses and out-patient surgical procedures with expected brief recuperating periods. It does not provide for the intermittent care of a child for such commonplace illnesses as colds and flu.
- B. A husband and wife who are eligible for FMLA leave and are employed by the same agency (or facility) may be limited to a combined total of 12 weeks of leave during a leave year (January 10 – January 9) if the leave is taken:
 1. for the birth of the employee's son or daughter or to care for the child after birth;
 2. for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement; or
 3. to care for the employee's parent with a serious health condition.

Family and Medical Leave

Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for one of the above purposes, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for a purpose other than those listed in this section.

The mother may incur a period of disability in the case of pregnancy and childbirth. This period would be considered FMLA leave for her own serious health condition and would not be subject to the combined limit.

This limitation does not apply to agencies with multiple facilities that have separate codes. Instead, the limit is imposed at the facility level.

V. PAID LEAVE

- A. Employees have the option of using paid leave, as appropriate under each particular leave policy, for absences covered under family and medical leave. An agency may designate such leave as family and medical leave, if it meets the conditions of sections III (A) and (B) above.

[REVISED 12/94]

NOTE: Other leave policies have not changed as a result of implementing this policy. For example, employees still are entitled to use only *up to* six days of sick leave for short-term family illnesses in a calendar year.

- B. If employees' accrued leave balances are used for Family and Medical Leave, then agencies are required to provide only the number of unpaid workdays which, when combined with the number of days of other leave taken, equal a total of 60 workdays or 480 work hours.

EXAMPLE:

An employee uses three days of sick leave and 18 days of annual leave to care for a parent who has a serious health condition. His agency must allow him to take 39 days of unpaid leave if he requests such.

VI. INTERMITTENT LEAVE OR LEAVE ON REDUCED SCHEDULE

Employees may take intermittent leave or work a reduced schedule, not to exceed 480 hours for full-time employees, as follows.

- A. When medically necessary because of an eligible employee's own serious health condition or the serious health condition of a child, spouse or parent, an employee may take family or medical leave on an intermittent leave basis or a reduced schedule as indicated below.
1. intermittent leave schedule - a leave schedule permitting the employee to take leave periodically for a few hours a day (less than eight hours), or for a few days, on an as-needed basis.

Family and Medical Leave

NOTE: Employees may be required to provide medical certification that intermittent leave is necessary.

2. reduced schedule - a leave schedule permitting the employee to reduce his or her usual number of hours worked per workweek or per workday.
- B.** Employees who must take intermittent leave or work a reduced schedule may either use their available paid leave balances as permitted by each specific leave policy or take unpaid family and medical leave.
- C.** Employees do not accrue annual and sick leave when they are on leave without pay status during family and medical leave.
- [Revised 7/94]
- D.** *If approval is granted by agency management in advance, an employee may take leave intermittently or on a reduced schedule to care for a newborn child, or a child that has been placed with the employee for adoption or foster care.*
- E.** When the conditions noted in section VI(A) above are applicable, the agency can temporarily transfer the employee to another position that better accommodates the intermittent leave or reduced schedule as long as the new position carries equivalent pay and benefits.

VII. FAMILY AND MEDICAL LEAVE NOTIFICATION/SCHEDULING

- A. Employee responsibility**
An employee should submit a written request for family and medical leave at least 30 days before the anticipated beginning of the family and medical leave, unless emergencies or unforeseen events preclude such advance notice.
- B. Agency actions**
1. The agency must grant an eligible employee's request to take up to 12 workweeks of family leave during a calendar year for the reasons stated in section III(B) above.
 2. The agency may require certification for leave that is requested for an employee's serious health condition or for his or her family member's serious health condition before granting family and medical leave.
 3. The agency must notify key employees before they begin family and medical leave that they may be denied restoration to their positions as discussed in section IX(B) below.

VIII. CERTIFICATION OF NEED FOR LEAVE

- A.** The agency may require that a request for family and medical leave be supported by a health care provider's certification of the medical condition of the person affected to include the date when the serious condition began, the probable duration of the condition, and other appropriate facts as detailed below.
1. A family illness request requires a statement that the employee is needed to care for a child, spouse or parent, and must include the estimated time needed.

Family and Medical Leave

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2. A personal illness request requires a statement that the employee is unable to perform the essential functions of his or her job as defined by the Americans with Disabilities Act.
 3. An intermittent leave or reduced schedule request necessitated by an employee's own health condition must include a statement of the medical necessity for the leave and the expected duration.
 4. An intermittent leave or reduced schedule requested for the care of an employee's family member requires a statement that the employee's leave is "needed to care for" the family member, the expected duration, the expected treatment dates and the schedule of intermittent leave or reduced leave. The term "needed to care for" includes:
 - a. the medical certification provisions encompassing both physical and psychological care, and it includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a seriously ill child or parent receiving inpatient care;
 - b. situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home; and
 - c. an employee's intermittent leave or a reduced schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently, such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

NOTE: When possible, the employee should provide certification in advance of, or at the commencement of, the requested leave. When that is not possible, certification must be provided reasonably soon after the leave begins.

B. Second and third opinions

1. Agencies may require, at their own expense, a second opinion from their designated or approved health care providers. (This health care provider cannot be one who is employed by the agency on a regular basis.)
2. When the second opinion differs from the first, agencies may, at their own expense, require a third opinion from a health care provider designated or approved jointly by the employee and the agency. The opinion of the third health care provider shall be considered final and binding upon the employer and the employee.

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- Agencies may require an employee to report periodically during the leave period on his or her leave status and intention to return to work, and to provide subsequent re-certifications on a reasonable basis.

Family and Medical Leave

NOTE: Requests for re-certification every four to six weeks are considered reasonable.

IX. RESTORATION TO POSITION

- A.** At the end of family and medical leave, employees normally are to be reinstated as follows:
1. Original position - agencies normally must restore employees to the positions they held (or to equivalent positions) when the leaves began unless they held key positions (as defined in section IX(B) below) which needed to be filled during their absences.
 2. Equivalent position - if previous positions have been filled, employees are entitled to restoration to equivalent positions.
standard of equivalence: requires comparability and correspondence to duties, terms, conditions, and privileges of the employees' previous positions.
 3. Conditions upon restoration of job position - agencies can require their employees to report periodically on their status and intent to return to work, and can require certification from health care providers that employees are able to return to work.

[REVISED 12/94]

- B.** If an employee's position is determined to be key (within the highest paid 10 percent of the *state's* employees *who work within 75 miles of the agency/facility*), he or she may be denied restoration when:
1. the agency shows that denying restoration "is necessary to prevent substantial and grievous economic injury" to the agency's operations;
 2. the agency notifies the employee that restoration will be denied at the time the agency determines that grievous economic injury would occur; and
 3. the employee already has begun the leave and elects not to return to employment within a reasonable time after receiving the agency's notice.

X. STATUS OF BENEFITS DURING FAMILY AND MEDICAL LEAVE

- A.** Agencies will continue to contribute to the health insurance premiums of salaried employees who are on leave under the Family and Medical Leave Act as discussed below.
1. When employees are using paid annual or sick leave under the provisions of FMLA, the payroll deductions of their portions of the premiums continue.
 2. When employees are on leave without pay under the provisions of FMLA, their premium contributions will be handled as if they were on leave without pay.
- B.** Employees who are on leave under FMLA will pay the same portion of their health insurance premiums as they would if they were not on leave.

Family and Medical Leave

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1. Premiums are due to agencies by the first day of each month of coverage.
 2. If employees fail to make premium payments, agencies will follow the same procedures to terminate coverage as they would if employees failed to pay premiums while on leave without pay.
 3. If employees fail to return to work at the end of leave under FMLA, their agencies may recover from them the Commonwealth's share of premiums paid during the period of leave. However, there will be no recovery of premiums if employees fail to return to work as a result of:
 - a. the onset, recurrence, or continuation of serious health conditions that entitle them to leave to care for themselves or for a family member; or
 - b. other circumstances beyond the employee's control.

EXAMPLES:

If an employee fails to return to work secondary to a disabling condition, the agency will not seek reimbursement for the Commonwealth's contributions for health insurance coverage during the period of leave.

If an employee fails to return to work at the end of FMLA leave because of his or her acceptance of other employment, the agency should seek to recover the Commonwealth's contributions for health insurance coverage during the period of leave.

C. Incentive increases - employee eligibility for incentive increases will be determined in accordance with Incentive Pay Plan policies and procedures which address leave with and without pay.

D. Life insurance - agencies will continue to pay life insurance premiums while employees are on family and medical leave.

[EFFECT. 1/1/95]

E. Leave accrual - employees will not accrue annual or sick leave hours during any period of leave without pay, or after 90 calendar days on leave with pay.

F. Retirement

1. Retirement contributions (including the component to fund the health credit) will be made for any pay period in which qualifying compensation has been received by the employee.
2. Retirement contributions will not be made for any pay period in which no qualifying compensation has been received by the employee (i.e., the employee was on leave without pay for the entire pay period).

G. Other

1. Service credit toward sick leave payout - employees' periods of unpaid family and medical leave exceeding 14 consecutive calendar days are not credited as service time toward the required five years of continuous state service which employees must have in order to receive payment for sick leave balances when they separate from state employment.
2. Next Annual Leave Anniversary Dates - when more than 14 consecutive calendar days of unpaid family and medical leave are taken, employees

Family and Medical Leave

will be placed on inactive service status and their next annual leave anniversary dates will be advanced according to the length of time taken on unpaid family leave.

3. Family and medical leave without pay should be keyed in as a PSE 135 transaction in the Personnel Management Information System (PMIS) when more than 14 consecutive calendar days for FMLA are taken.

XI. MANAGEMENT OF FMLA RECORDS

- A. Agencies must make, keep and preserve records pertaining to their obligations under FMLA.
- B. Records must be kept for at least three years.
- C. Required records must include the information listed below.
 1. Basic payroll and identifying employee data, including: name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.
 2. Leave designated as FMLA leave, both paid and unpaid, and the dates employees took it. (If FMLA leave is taken in increments of less than a day, the hours must be noted.)
 3. Copies of employees' notices of leave furnished to agency.
 4. Any documents (including written and electronic records) describing employee benefits or agency policies and practices regarding the taking of paid and unpaid leaves.
 5. Records of premium payments.
 6. Records of any dispute between the agency and an employee regarding designation of leave as FMLA leave, including any written statement from the agency or employee of the reasons for the designation and for the disagreement.
- D. Records and documents relating to medical certifications, re-certifications or medical histories of employees or employees' family members are to be maintained in separate files/records and treated as confidential medical records except:
 1. supervisors and managers may be informed regarding necessary restrictions on work duties and necessary accommodations;
 2. first aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
 4. government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

Family and Medical Leave

XII. AUTHORITY AND INTERPRETATION

This policy is issued by the Department of Human Resource Management pursuant to the authority provided in Chapter 12, Title 2.2, of the Code of Virginia, as well as the federal Family and Medical Leave Act of 1993. This policy is not intended to outline all the provisions of the Family and Medical Leave Act. Accordingly, the provisions of the Act will prevail if there is disagreement. This policy supersedes Policy 4.03, Family and Medical Leave, effective August 5, 1993.

The Director of the Department of Human Resource Management is responsible for official interpretation of this policy, in accordance with §2.2-1201 of the Code of Virginia. Questions regarding application of this policy should be directed to the Department of Human Resource Management's Office of Agency Human Resource Services. The Department of Human Resource Management reserves the right to revise or eliminate this policy as necessary.